

## FIRST WORDS: THE PREAMBLE TO THE AUSTRALIAN CONSTITUTION

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### I INTRODUCTION

A preamble to a legal instrument, such as a statute or constitution, is an introductory passage or statement that precedes the operative or enforceable parts of the document. Constitutional preambles may articulate and give legitimacy to profound political change. They can provide purpose and rationale, elucidate intention, and potentially serve as the declaration of belief for a political community. They are often the first words of 'the people', their *raison d'être* and their *cri de coeur*. For this reason, unlike many other sections of a constitution, the importance of constitutional preambles is not confined to the legal and political arena. Culturally specific, their simple but direct language may permeate the social and cultural fabric, acting as a potential totem for state, community and individual.<sup>1</sup>

In the constitutional setting, a preamble can fulfil two important functions.<sup>2</sup> First, in its symbolic aspect, a preamble can capture and chart, in a pithy and quotable form, the history and aspirations of a nation. Although a preamble does not create substantive rights or obligations, its symbolic aspect may assist in the interpretation of the constitution itself by providing normative guidance. Thus, in its second, justiciable aspect, a preamble can be used in constitutional

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1 George Winterton, 'A New Constitutional Preamble' (1997) 8 *Public Law Review* 186, 186-7.

2 See also the functions of a constitutional preamble as listed by John Williams, 'The Republican Preamble: Back to the Drawing Board?' (1999) 10 *Public Law Review* 69, 70-1. On the symbolic and functional aims of a preamble see Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260.

interpretation and in the construction of statutes and the development of the common law as a legally useful statement of fundamental values.

The poignant and evocative Preamble to the recently proclaimed *Constitution of the Republic of South Africa* demonstrates the potential for constitutional preambles to serve as a means of healing past divisions and as instruments of reconciliation. That Preamble recognises the 'injustices of our past' and affirms a common belief 'that South Africa belongs to all who live in it, united in our diversity' and that the new Constitution was adopted to 'establish a society based on democratic values, social justice and fundamental human rights'. Other preambles demonstrate a similar relationship to the social and political culture of a nation. In the *Constitution of Ireland*, the Preamble reads like a Papal decree, invoking 'the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred'. This is consistent with the historical significance of Catholicism in the definition of Irish Republican identity. The *Constitution of Japan* and the German Constitution (the *Basic Law for the Federal Republic of Germany*) express the desire for 'world peace' in their respective Preambles. While some preambles serve as 'manifestos of nationalism', others, such as those of Germany and Japan, turn their backs on recent historical experience, acknowledging the past in the hope that things will be different in the future.<sup>3</sup>

The historical traditions of Australian political culture, influenced heavily by those of Great Britain, tend to be sceptical of constitutional or political declarations of democratic values. We have no 'Fourth of July' nor 'Independence Day' to serve as our founding moment. The very concept of a preamble as a definitive statement of a people's aspirations has its origins in the politics of the French and American revolutions in the late 18<sup>th</sup> century. Because Australia lacks a similar historical experience, such as the revolutionary overthrow of a monarchy or colonial overlord, we have not defined our national identity in a specific declaration of political principle.

This paper examines the legal issues relating to the current Preamble to the *Australian Constitution* ('Constitution'). After tracing the origins of the current Preamble and examining its role and status within the legal system, the paper proceeds to discuss the emerging movement for a new preamble. Finally, it examines whether a new preamble ought to be justiciable, rather than merely symbolic, and makes a case for justiciability. The debate over and drafting of the preamble proposal put to the Australian people in the referendum held on 6 November 1999 is the subject of our companion article, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble'.<sup>4</sup>

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3 Ivo D Duchacek, *Power Maps: Comparative Politics of Constitutions* (1973) 17.

4 (2001) 24 *University of New South Wales Law Journal* 401.

## II THE PREAMBLE AND ITS ORIGINS

On 9 July 1900, the Act of British Parliament that brought the Australian Commonwealth into existence, the *Commonwealth of Australia Constitution Act 1900 (Imp)*, received the Royal Assent. The Act came into force on 1 January 1901. The *Australian Constitution* is contained in cl 9, which begins: 'The Constitution of the Commonwealth shall be as follows:'. A Preamble precedes this and the other eight covering clauses, and thus forms part of the British Act rather than part of the Constitution itself.<sup>5</sup> The Preamble, and its placement in the United Kingdom ('UK') Act, is a reminder of Australia's colonial origins:

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

This Preamble had its genesis in the National Australasian Convention of 1891 held at Sydney, although it appears not to have been debated at that Convention and is merely included in the draft constitution produced by that body.<sup>6</sup> The 1891 preamble was debated at the Australasian Federal Convention of 1897-98 at the sessions held at Adelaide<sup>7</sup> and Melbourne,<sup>8</sup> and revised versions were drafted.<sup>9</sup>

The founders devoted little time to debating the Preamble in Adelaide in 1897 and Melbourne in 1898 – with three exceptions. First, concern over the word 'Commonwealth' stemmed from its alleged republican connotations. Some delegates believed that it evoked memories of the protectorate of Oliver Cromwell.<sup>10</sup> Second, the Preamble's recitation of 'one indissoluble Federal Commonwealth' arose in debates about whether a State might be able to secede

5 See *Application for leave to issue a proceeding*; Neville George Ford (1999) 166 ALR 661, 662 (Gaudron J).

6 See the draft preamble set out in Sydney, *Official Record of the Debates of the Australasian Federal Convention (1891-98)* (1891) vol 1, 943.

7 Adelaide, *National Australasian Convention Debates*, 22 April 1897, 1183-9.

8 Melbourne, *Australasian Federal Convention Debates*, 2 March 1898, 1732-41.

9 See the revised drafts in Adelaide, *National Australasian Convention Debates*, 23 April 1897, 1221 and 'Draft of a Bill To Constitute the Commonwealth of Australia' in Melbourne, *Australasian Federal Convention Debates*, 1898, 2525.

10 Sydney, *National Australasian Convention Debates*, 1 April 1891, 550-7. This discussion arose out of the drafting of cl 1 of what became the *Commonwealth of Australia Constitution Act 1900 (Imp)*. The issue is the same, however, in regard to the appearance of the word 'Commonwealth' in the Preamble.

from the new Federation.<sup>11</sup> Third, delegates debated whether the Preamble should include God's blessing.<sup>12</sup> The inclusion of such a phrase was due largely to the efforts of South Australian delegate Patrick Glynn. In 1897 in Adelaide, Glynn argued that the Preamble should include the words 'invoking Divine Providence' to reflect the 'great central fact of faith' and the 'spirit of reverence for the Unseen' that pervaded civil life in Australia.<sup>13</sup> The Convention rejected this by 17 votes to 11.<sup>14</sup> After the Adelaide meeting, there was, according to Edmund Barton – later Australia's first Prime Minister and one of the first members of the High Court – 'considerable argument and a certain degree of warmth about this matter'.<sup>15</sup> Glynn then made a second attempt in Melbourne in 1898, where he proposed the words 'humbly relying upon the blessing of Almighty God'.<sup>16</sup> This form of words was accepted by the Convention.<sup>17</sup>

John Quick and Robert Garran, writing in 1901, state that the Preamble does not depart from the basic structure laid down for preambles in late 19<sup>th</sup> century publications on statutory interpretation.<sup>18</sup> Their elucidation of the eight 'separate and distinct affirmations or declarations in the Preamble' is the most concise analysis of the rationale that prevailed in the minds of the framers of the Constitution.<sup>19</sup> Quick and Garran believed the purpose of the Preamble was to declare:

- (1) the agreement of the people of Australia;
- (2) their reliance on the blessing of Almighty God;
- (3) the purpose to unite;
- (4) the character of the union – indissoluble;
- (5) the form of the union – a Federal Commonwealth;
- (6) the dependence of the union – under the Crown;
- (7) the government of the union under the Constitution; and
- (8) the expediency of provision for admission of other colonies as States.

11 See, eg, Adelaide, *National Australasian Convention Debates*, 29 March 1897, 217 (William McMillan). See generally Gregory Craven, 'An Indissoluble Federal Commonwealth? The Founding Fathers and the Secession of an Australian State' (1983) 14 *Melbourne University Law Review* 281, 293-9.

12 For discussion of the 1890s debate surrounding the inclusion of God's blessing in the Preamble, see Richard Ely, 'Andrew Inglis Clark on the Preamble to the Australian Constitution' (2001) 75 *Australian Law Journal* 36 and Mark McKenna, 'Maker of Miracles' in David Headon and John Williams (eds), *Makers of Miracles* (1998).

13 Adelaide, *National Australasian Convention Debates*, 22 April 1897, 1184-5. Glynn's private reflections in his diary were quite different. After ensuring God's inclusion in Melbourne, Glynn wrote in a matter of fact style: 'Today I succeeded in getting the words humbly relying on the blessing of Almighty God in the Preamble. It was chiefly intended to secure greater support from a large number of voters': Patrick Glynn, *Diaries*, 2 March 1898 (available from Mortlock Library, State Library of South Australia). See also Melbourne, *Australasian Federal Convention Debates*, 4 February 1898, 656 (Henry Higgins) and Melbourne, *Australasian Federal Convention Debates*, 2 March 1898, 1776 (Josiah Symon).

14 Adelaide, *National Australasian Convention Debates*, 22 April 1897, 1189.

15 Melbourne, *Australasian Federal Convention Debates*, 2 March 1898, 1737 (Edmund Barton).

16 *Ibid* 1732.

17 *Ibid* 1741.

18 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 284.

19 *Ibid* 286.

As Quick and Garran observed of the above affirmations, only the third, fifth, seventh, and eighth are found elsewhere in the Constitution. The remaining four have therefore to be regarded as promulgating principles, ideas or sentiments operating, at the time of the formation of the instrument, in the minds of the framers, and by them imparted to and approved by the people to whom it was submitted.<sup>20</sup>

### III THE LEGAL STATUS OF THE PREAMBLE

The Preamble has had only a minor impact upon the development of Australian law. This may have surprised the Constitution's framers who, it seems, anticipated that the High Court would use the Preamble in interpreting the operative provisions of the Constitution. While the opportunities for reliance upon the Preamble may have been limited in the early years following Federation, the evolution of Australian constitutionalism over more recent decades has presented many new contexts to which the Preamble might be thought relevant. These contexts include federalism and conceptions of judicial power, the republic debate, questions of sovereignty and the distillation of implied rights. Despite these developments, the Court has generally treated the Preamble with a mixture of indifference and reticence.

The framers, along with leading commentators of the time, anticipated a role for the Preamble in constitutional interpretation. This was a factor in the inclusion of s 116 of the Constitution, which provides that the Commonwealth cannot pass laws abrogating freedom of religion.<sup>21</sup> Section 116 was based upon a provision accepted at the 1891 Convention and drafted by Tasmanian Attorney-General Andrew Inglis Clark.<sup>22</sup> In 1898, the section was retained in an amended form largely at the behest of Henry Higgins, subsequently a justice of the High Court. Higgins put the rather far-fetched argument that the Commonwealth Parliament might be able to claim a power to legislate in regard to religion as a result of the Preamble's reference to 'Almighty God'.<sup>23</sup> According to Higgins, s 116 was needed not to protect a fundamental human right, but to

make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken, and to make it clear that in framing this Constitution there is no intention whatever to give to the Federal Parliament the power to interfere in these matters.<sup>24</sup>

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20 Ibid.

21 The section states in full: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

22 See Richard Ely, 'Andrew Inglis Clark and the Church-State Separation' (1975) 8 *Journal of Religious History* 271; George Williams, *Human Rights Under the Australian Constitution* (1999) 35-6.

23 See *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 612 (Mason J) ('DOGS Case'); Cliff Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41, 53-5; Quick and Garran, above n 18, 951.

24 Melbourne, *Australasian Federal Convention Debates*, 2 March 1898, 1769; also 1735-6 (Henry Higgins), 1737 (Edmund Barton); Melbourne, *Australasian Federal Convention Debates*, 4 February 1898, 654, 656, 663 (Henry Higgins).

Although other members of the Convention argued that the Preamble would not enable the Commonwealth to pass laws on religious matters,<sup>25</sup> s 116 was nevertheless agreed to, in the words of W Harrison Moore, 'to meet the danger'.<sup>26</sup> This suggests that at least some of the framers believed that the Preamble might affect the scope of federal legislative power and that it might play a role in constitutional interpretation in other areas not subject to a provision such as s 116.

Commentators writing on the newly enacted Constitution shared the belief that the Preamble would be justiciable. Quick and Garran asserted that sections of the Preamble:

may be of valuable service and potent effect in the Courts of the Commonwealth, aiding in the interpretation of words and phrases which may now appear comparatively clear, but which, in time to come, may be obscured by the raising of unexpected issues and by the conflict of newly emerging opinions.<sup>27</sup>

Their view appears to have been based upon principles relating to the construction of ordinary statutes. Quick and Garran did not explain whether or why those principles would apply to a constitutional preamble. Anne Winckel has suggested that written constitutions, when compared with ordinary statutes, may be distinct in their 'authorship, content, amendability and [manner of] interpretation'.<sup>28</sup> These and other inherent differences may limit the extent to which the High Court, in deciding how to use the Preamble as an aid to interpretation, would reason by analogy from the statutory context. Although the High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers Case*')<sup>29</sup> emphasised that the Court should interpret the Constitution in accordance with the ordinary rules of statutory construction, the High Court has not dealt with this issue in the context of the Preamble, nor has it articulated an interpretive approach indicating the weight that the Preamble should be given.

Nevertheless, as George Winterton has suggested, the Preamble 'will inevitably be employed in constitutional interpretation',<sup>30</sup> although its persuasiveness will continue to be a matter of debate. According to Gregory Craven, the ordinary rules of statutory construction and analogous principles of constitutional interpretation suggest that the Preamble can be determinative of a legal question only where it assists in resolving existing ambiguity in the substantive provisions of the Constitution.<sup>31</sup> Craven is clearly correct. The Preamble should not be ascribed the same legal effect as an operative provision.

25 Melbourne, *Australasian Federal Convention Debates*, 2 March 1898, 1737 (Dr John Quick): 'I do not know that the placing of these words in the preamble will necessarily confer on that Parliament any power to legislate in religious matters'; 1738-9 (William Lyne); and 1740-1 (Sir John Downer): 'Whether the words are inserted or not, I think they will have no meaning, and will have no effect in extending the power of the Commonwealth'.

26 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910) 288.

27 Quick and Garran, above n 18, 286.

28 Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184, 210 fn 210.

29 (1920) 28 CLR 129.

30 Winterton, above n 1, 189.

31 Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1984) 15 *Federal Law Review* 123, 126-35.

Until recently, only two aspects of the Preamble seemed to invite judicial consideration as an aid to construing the Constitution's operative provisions. One, the reference to 'Almighty God', was stripped of its potential interpretive significance by the inclusion of s 116. The other, the words 'indissoluble Federal Commonwealth', which Isaacs J described in *Federated Saw Mill & c Employees of Australasia v James Moore & Son Proprietary Ltd* ('Woodworkers' Case')<sup>32</sup> as 'pious aspirations for unity', thus became the focus of what little judicial attention was paid to the Preamble. Outside of the courts, the phrase has been considered in debate over the potential for secession by one or more States.<sup>33</sup> Craven has argued that the phrase could not, by itself, provide a constitutional barrier to a State seceding, stating that the Preamble 'could never operate as a direct prohibition of the unilateral secession of a State'.<sup>34</sup>

In High Court judgments, references to the phrase 'indissoluble Federal Commonwealth' have generally had little legal significance. Judges have typically used this evocative phrase to describe the historical event of Federation or to convey a sense of the sentiment of the time, rather than as support for a particular legal conclusion.<sup>35</sup> However, there are few cases in which the phrase has been cited in support of a legal conclusion. In *Victoria v Commonwealth* ('Payroll Tax Case'),<sup>36</sup> Menzies J, in articulating the rationale for an implied doctrine of State immunity from Commonwealth laws, stated that a 'constitution providing for an indissoluble Federal Commonwealth must protect both Commonwealth and States'. In *Queensland v Commonwealth* ('Second Territory Senators Case'),<sup>37</sup> Barwick CJ raised the indissoluble federal nature of the Commonwealth in reasoning to the conclusion that Territory residents could not elect representatives to the Senate. On the other hand, Toohey J in *Kruger v Commonwealth* ('Stolen Generations Case')<sup>38</sup> referred to the Preamble in support of his conclusion that the Territories form part of the federal system – at least for the purposes of Chapter III 'federal' judicial power. Finally, in *R v Hughes*, Kirby J found that '[t]his Court should be the upholder, and not the destroyer, of lawful cooperation between the organs of government in all of the constituent parts into which the Commonwealth of Australia is divided'.<sup>39</sup> He went on to argue:

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32 (1909) 8 CLR 465, 535.

33 Gregory Craven, *Secession: The Ultimate States Right* (1986). See also Moore, above n 26, 603.

34 Craven, above n 31, 131. See also Craven, above n 33, 133.

35 Examples of this descriptive use of the Preamble include: *Bonser v La Macchia* (1969) 122 CLR 177, 223 (Windeyer J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 660 (Deane J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 197 (Wilson J), 207 (Brennan J) ('*Tasmanian Dams Case*'); *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ).

36 (1971) 122 CLR 353, 386.

37 (1977) 139 CLR 585, 592.

38 (1997) 190 CLR 1.

39 (2000) 171 ALR 155 at 170.

No other approach is appropriate to the interpretation of the basic law of the 'indissoluble Federal Commonwealth' upon which the people of Australia agreed when the Constitution was adopted and which they are taken to accept for their governance today.<sup>40</sup>

In none of these cases, however, did reference to the phrase 'indissoluble Federal Commonwealth' constitute the central, or even a particularly significant, plank in the reasoning or conclusions of the Judge. In each instance, it played a mere supporting role to other arguments. Reference to the Preamble may have had an important rhetorical or symbolic impact, but hardly a legally important one.

In *R v Sharkey*,<sup>41</sup> Latham CJ revealed a further, more imaginative, possibility for the Preamble that foreshadowed more contemporary controversies. He invoked the Preamble's description of a Commonwealth 'under the Crown' in deciding on the validity of a Commonwealth sedition law. The High Court was asked to rule on a provision of the *Crimes Act 1914* (Cth) that prohibited the publication of anti-monarchy propaganda. In finding the provision constitutionally valid, Latham CJ seemed to suggest that the express incidental power, granted to the Commonwealth in s 51(xxxix) of the Constitution, could operate upon the Preamble with the effect that:

Laws which are directed to the protection and maintenance of the legal and political organization of the Commonwealth and of the Commonwealth in its legal and political relations may properly be enacted under [s 51(xxxix)].<sup>42</sup>

Chief Justice Latham's comments, viewed in isolation, seem to treat the Preamble as augmentative of Parliament's enumerated powers. They suggest that the indissolubility of the Commonwealth and the Monarch's place within it, confirmed in the Preamble, are legitimate objectives in relation to which the Commonwealth Parliament may exercise incidental power. However, Latham CJ went on to observe that legislation concerned with the Monarch's position could equally rest on the operation of s 51(xxxix) upon ss 1 and 61 of the Constitution. In any case, his comments have not been adopted by other judges and remain an anomaly in the Court's treatment of the Preamble.

The course of Australia's more recent constitutional development has suggested new contexts in which the Preamble might have value as an interpretive tool. One of these new potential uses is that foreshadowed by Latham CJ: to assist in identifying the nature of Australia's constitutional connection with the UK. That question arose in *Sue v Hill*<sup>43</sup> in 1999, exactly 50 years after the decision in *R v Sharkey*, and in very different social, political and legal circumstances. Heather Hill, a dual British-Australian citizen, asserted that she was not a 'subject or citizen of a foreign power' within the meaning of s 44(i) of the Constitution, and thus that she was not disqualified from holding a seat in the Senate. In arguing that the UK should not be regarded as a foreign power, Hill relied upon, among other things, the Preamble's reference to the

40 Ibid. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 (Gummow and Hayne JJ).

41 (1949) 79 CLR 121.

42 Ibid 135.

43 (1999) 199 CLR 462.



creation of the Commonwealth 'under the Crown of the United Kingdom'. This, it was argued, demonstrated a special and immutable relationship between Australia and the UK. The leading judgment of Gleeson CJ, Gummow and Hayne JJ, however, denied that the terms of the Preamble have any significance for the legal relationship between Australia and the UK.<sup>44</sup> They looked instead to other evidence, such as the *Australia Acts 1986* (Imp/Cth), to confirm that the UK should now be regarded as a foreign power.

Justice Michael Kirby of the High Court, writing extra-judicially, has raised the question whether the Preamble's reference to the creation of 'one indissoluble Federal Commonwealth *under the Crown*' would prevent Australia from becoming a republic or require steps to be taken other than a successful referendum under s 128 of the Constitution.<sup>45</sup> It might be argued that the Preamble creates an unbreakable link between our system of government and the Crown that could not be severed even by a referendum. However, this argument is untenable. As a mere statement of intent, the Preamble could not realistically be given an operation that would supersede that of the substantive provisions of the Constitution, as amended. Moreover, such an interpretation would run counter to the emerging notion that the efficacy of the Constitution now rests upon the sovereignty of the Australian people, and not upon its enactment by the UK Parliament. If the Preamble was not itself amended as part of the referendum that transformed Australia into a republic, and the words 'under the Crown' were retained, this would produce an anachronism rather than a constitutional contradiction of legal significance.

According to Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* ('*Australian Capital Television*'),<sup>46</sup> the passage of the *Australia Acts 1986* (Imp/Cth) 'marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people'. After the severing of legal ties with the UK, a new rationale was needed to explain why the Constitution is binding. It might be thought that the Preamble supports the contemporary notion of 'popular sovereignty'<sup>47</sup> – that is, the idea that the present legitimacy of the Constitution 'lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'.<sup>48</sup> However, no judgment of the High Court has yet referred to the Preamble, which begins 'Whereas the people', as evidence of popular sovereignty. By contrast, in *Australian Capital Television*, Dawson J pointed to the terms of the Preamble as a consideration militating against the notion of popular sovereignty. According to Dawson J, not only does the Preamble serve as an ongoing reminder of the Constitution's origins in an Act of

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44 Ibid 502.

45 Justice Michael Kirby, 'The Australian Referendum on a Republic – Ten Lessons' (2000) 46 *Australian Journal of Politics and History* 510, 513-14.

46 (1992) 177 CLR 106, 138.

47 Geoffrey Lindell, 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 37.

48 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J). See Williams, above n 22, 91-2.

the British Parliament, it also represents a conscious departure from the United States model of preambular confirmation of popular sovereignty.<sup>49</sup>

The realm of implied rights is another contemporary context in which the Preamble might have taken on some significance as an interpretive tool. Yet, with the exception of one isolated and since disavowed instance, judges have been reluctant to underpin their recognition of new implied rights with references to the Preamble. The first invocation of the Preamble in the context of implied rights appeared in Justice Gaudron's judgment in *Australian Capital Television*. In that case, the Court held that the Constitution contains an implied freedom of political communication. Gaudron J took account of the Preamble's reference to the fact that 'the people ... have agreed to unite' in the new Federal Commonwealth, finding that this 'reinforced' her conclusion, drawn principally from other provisions of the Constitution, that '[r]epresentative parliamentary democracy is a fundamental part of the Constitution'.<sup>50</sup>

While the Preamble represented only a secondary consideration for Gaudron J in *Australian Capital Television*, it took on greater significance for other members of the Court in *Leeth v Commonwealth* ('*Leeth*').<sup>51</sup> The plaintiff in *Leeth*, a 'federal offender' serving a sentence in a State gaol, contested the validity of the *Commonwealth Prisoners Act 1967* (Cth). At the time of *Leeth*'s sentencing, s 4 of that Act instructed judges sentencing 'federal offenders' to set a minimum non-parole period by reference to the criteria set out in the legislation of each State. This ensured uniform parole expectations for all prisoners – State and federal – within a single State prison. However, it meant that parole expectations would differ among prisoners convicted of the same Commonwealth offence, depending upon the State in which sentencing took place. This result, the plaintiff argued, infringed an implied principle of equality found in the Constitution.

Three members of the High Court referred to the Preamble in the course of their reasoning. Justice Brennan commented that, if the law being challenged had allowed different maximum penalties (as opposed to different non-parole periods) to be prescribed for the same offence, then the plaintiff's arguments would have had 'much force'.<sup>52</sup> According to Brennan J,

[i]t would be offensive to the constitutional unity of the Australian people 'in one indissoluble Federal Commonwealth' recited in the first preamble to the *Commonwealth of Australia Constitution Act 1900*, to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and sentenced.<sup>53</sup>

Justices Deane and Toohey went further and concluded that the Commonwealth law was invalid because it offended an implied guarantee of legal equality. They asserted the presence of the doctrine in the Constitution by

49 See, to similar effect, Justice Michael Kirby, 'Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution' (1996) 3 *Deakin Law Review* 129, 138.

50 (1992) 177 CLR 106, 210.

51 (1992) 174 CLR 455.

52 *Ibid* 475.

53 *Ibid*.

reference to a number of indicia, including the Preamble. They viewed legal equality as being implicit in the 'conceptual basis' of the Constitution:

As the preamble ... make[s] plain, that conceptual basis was the free agreement of 'the people' – all the people – of the federating Colonies to unite in the Commonwealth under the Constitution. Implicit in that free agreement was the notion of the inherent equality of the people.<sup>54</sup>

For these three judges, the Preamble appeared to represent a legitimate source from which to infer limitations on Commonwealth legislative power.

The suggestion that the Constitution contains an implied principle of legal equality, operating as a limitation on governmental power, was disavowed in the *Stolen Generations Case*. The approach of Deane and Toohey JJ in *Leeth* was rejected by a High Court majority composed of Dawson, Gaudron, McHugh and Gummow JJ. Justice Dawson, with whom McHugh J agreed, argued that it is illegitimate to invoke the 'conceptual basis' of the Constitution to derive limitations on express grants of power. The majority agreed that, to the extent that the Constitution does protect legal equality, that protection arises exclusively from the Chapter III grant of federal judicial power. As a consequence, while the reasoning in *Leeth* indicates the possibilities presented by the Preamble, they are not likely to find favour with the current High Court.

Precisely why the High Court has been, and remains, disinclined to use the Preamble in constitutional interpretation is unclear. At least two factors appear to have contributed. First, it ought not be overlooked that the Preamble offers rather slim pickings for judges seeking interpretive assistance. By today's standards the Preamble is a bland, largely inconsequential collection of sentiments that could have only a limited and sporadic relevance to the array of constitutional problems currently facing the Court. While such sentiments can still assist in a very limited way in understanding what lay in the minds of the drafters of the Constitution, they are arguably now only of historical interest.

Secondly, the placement of the Preamble – that is, its position outside the operative provisions of the Constitution – renders it a dubious source of guidance, at least where assistance might be found within the text or structure of the Constitution itself. The Preamble's location is likely to have played a role in its relegation to a position of secondary importance. The High Court has generally been cautious in seeking interpretive guidance from extrinsic material, that is, from sources beyond the 'four corners' of the Constitution. In a related area, the High Court has been similarly reluctant to use of the Debates of the 1890s Conventions that drafted the Constitution. From the time of the *Engineers Case* in 1920, the Court rejected use of the Debates in the interpretation of the Constitution. The Court only revised its approach and permitted reference to the Convention Debates on a limited basis in 1988 in its unanimous decision in *Cole v*

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54 Ibid 286.

*Whitfield*.<sup>55</sup> The Court has yet to set out any like statement of approach to the Preamble.

#### IV CALLS FOR A NEW PREAMBLE

Since the mid-1980s, there has been discussion of the issues surrounding the insertion of a new preamble into the *Australian Constitution*. A number of submissions to the Constitutional Commission over the period 1985-88 registered strong interest in the constitutional expression of democratic values and rights and freedoms. Despite this, in its final report in 1988, the Commission refused to support the alteration of the present Preamble on three main grounds:

- (1) the difficulty of isolating the fundamental sentiments which Australians of all origins hold in common;
- (2) the difficulty of reaching agreement on an appropriate form of words with regard to recognition of Australia's Indigenous peoples; and
- (3) writing a new Preamble would only make sense if the Constitution were to be rewritten.<sup>56</sup>

In light of the public debate in 1999 on a new preamble,<sup>57</sup> the Commission's reservations have proved prescient.

In 1993, the report of the Republic Advisory Committee found that the issue of a new preamble was "relevant to the overall objective" of achieving a viable federal republic of Australia,<sup>58</sup> and set out the options for change. The 1994 inquiries by the Civics Expert Group and the Centenary of Federation Advisory Committee attracted submissions that pointed to the need for a 'restatement' of the values of Australian citizenship and the constitutional recognition of Aboriginal and Torres Strait Islander peoples. Throughout the 1990s, similar prominence was given to the importance of a new preamble in the policy documents of the Aboriginal and Torres Strait Islander Commission ('ATSIC'), the Council for Aboriginal Reconciliation, the National Multicultural Advisory Council and the published material and public activities of the Constitutional Centenary Foundation. In addition, the growing activism of Australian women in the republic debate, which culminated in the Women's Constitutional

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55 (1988) 165 CLR 360, 385. The Court found that regard could be had to the Convention debates 'for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement toward federation'. On the other hand, regard could not be had 'for the purpose of substituting for the meaning of the words used the scope and effect - if such could be established - which the founding fathers subjectively intended the section to have'. See also *Brown v The Queen* (1986) 160 CLR 171, 189 (Wilson J) and 214 (Dawson J); Gregory Craven, 'Original Intent and the Australian Constitution - Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166; Sir Daryl Dawson, 'Intention and the Constitution - Whose Intent?' (1990) 6 *Australian Bar Review* 93.

56 Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1, 109-10.

57 See McKenna, Simpson and Williams, above n 4.

58 Republic Advisory Committee, *An Australian Republic: The Options* (1993) vol 1, 137.

Convention, held in Canberra in January 1998,<sup>59</sup> also resulted in demands for a more inclusive preamble to the Constitution.<sup>60</sup>

After the High Court's decision in 1992 in *Mabo v Queensland [No 2]* ('*Mabo*'),<sup>61</sup> discussion of a new preamble also came to concern the form of words that might be used to recognise Indigenous Australians in the Constitution.<sup>62</sup> The discriminatory treatment of Australia's Indigenous peoples under the Constitution as enacted in 1901,<sup>63</sup> and the silence in the Constitution on their status and history since the 1967 referendum, arguably makes their inclusion in a new preamble an important part of any reconciliation process.<sup>64</sup>

However, support for a new preamble was not forthcoming from the Keating Government or the Australian Republican Movement. Their plans for constitutional change centred upon a 'minimalist' republic.<sup>65</sup> Both were unwilling to include a preamble as a key element in the achievement of a republic, believing that a broader republican platform would attract more opposition and thereby bring about the defeat of any referendum.

## V SHOULD A NEW PREAMBLE BE JUSTICIABLE?

In its early stages, debate over a new preamble focused upon the symbolic role that it might play in the shift to a republic and in giving constitutional recognition to Indigenous peoples. The role that a preamble might play in legal interpretation and development was largely ignored. When it did come to be considered, it produced strong disagreement even among the supporters of a new preamble. Much of the debate centred upon politically pragmatic concerns. It

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59 Online information on the Convention is archived at National Library of Australia, *Pandora Archive – Women's Constitutional Convention* (1998) <<http://pandora.nla.gov.au/tep/10129>> at 13 September 2001.

60 See Constitutional Commission, above n 56, vol 1, 20-4, 101-9; Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (1994) 13; Centenary of Federation Advisory Committee, *2001: A Report from Australia* (1994) 50. See also Marian Sawyer, *Women's Constitutional Activism in Australia and Canada* (Unpublished, 1998) (copy on file with authors).

61 (1992) 175 CLR 1.

62 Debra Jopson, 'Call to Note Blacks in Constitution', *Sydney Morning Herald* (Sydney), 13 August 1997, <<http://www.smh.com.au>>.

63 Prior to its amendment in 1967, s 127 of the *Australian Constitution* read as follows: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.'

64 Larissa Behrendt, 'What path Forward for Reconciliation? The Challenges of a New Relationship with Indigenous People' (2001) 12 *Public Law Review* 79, 80-1; Frank Brennan, 'The Prospects for National Reconciliation Following the Post-Wik Standoff of Government and Indigenous Leaders' (1999) 22 *University of New South Wales Law Journal* 618, 621-2; Garth Nettheim, 'Reconciliation and the Constitution' (1999) 22 *University of New South Wales Law Journal* 625, 627; George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

65 See, eg, Australian Republican Movement, *Australian Republican Movement Platform* (1991); John Howard, *An Australian Republic: The Way Forward – Questions and Answers*, unpublished document, Office of the Prime Minister, 7 June 1995, 19-20 (copy on file with authors). *The Australian* attempted to stimulate interest in the preamble by inviting leading figures to pen their own preambles.

was argued, for example, that a purely symbolic preamble ought to be preferred so as to gain the support of those who would oppose a new preamble having legal effect.<sup>66</sup>

The frequently suggested alternative to a justiciable preamble is a preamble having only 'symbolic' value – a kind of meaning inaccessible to the courts in their development and interpretation of the law. Two methods have been put forward for creating such a preamble. First, its terms could be deliberately framed so as to minimise opportunities for judicial reliance. For instance, the Constitutional Centenary Foundation suggested in 1993 that a new preamble's legal effect could be minimised by expressing particular values in the form of 'ideas' that motivate people, rather than as principles that underpin the Constitution.<sup>67</sup> Alternatively, a new preamble could be made subject to an express indication, either in the preamble itself or elsewhere in the Constitution, that courts are not to use the new preamble as an aid to interpreting the Constitution's operative provisions.

An argument raised in favour of making a new preamble justiciable relates to the role of the Australian people in the constitutional system. The contemporary High Court appears firmly committed to the principle of popular sovereignty.<sup>68</sup> This notion lends weight to the suggestion that judges ought not to be denied access to a statement of the shared values and aspirations of the Australian people, contained in a new preamble, in their interpretation of the Constitution.

This argument is strengthened when it is recognised that High Court judges will inevitably distil and rely upon values, whether they be their own or those of Australian society, in the course of deciding cases and developing the law.<sup>69</sup> Some members of the Court have engaged overtly in this kind of process. For example, Gaudron J in *Minister for Immigration and Ethnic Affairs v Teoh*<sup>70</sup> relied upon 'community values' as a tool to assist in determining the legal effect within Australia of a ratified international convention. Sir Anthony Mason has also argued that judges may have 'reference to values which they perceive to be desirable, accepted community values'.<sup>71</sup> He has stated:

[I]t is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. The ever-present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values.<sup>72</sup>

66 See, eg, George Winterton, 'The 1998 Convention: A Reprise of 1898?' (1998) 21 *University of New South Wales Law Journal* 856, 863.

67 Constitutional Centenary Foundation, 'We the people of Australia ...' – *Ideas for a New Preamble to the Australian Constitution* (1999) 8.

68 See above p 390.

69 See generally Justice Michael McHugh, 'The Law-making Function of the Judicial Process' (Pt 1) (1988) 62 *Australian Law Journal* 15; Justice Michael McHugh, 'The Law-making Function of the Judicial Process' (Pt 2) (1988) 62 *Australian Law Journal* 116.

70 (1995) 183 CLR 273, 304-5.

71 Garry Sturgess and Philip Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (1988) 345.

72 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5.

A statement of core values contained in a new preamble would provide the Court with express normative guidance and allow the people a degree of influence over the particular values on which judges might rely. Of course, the control actually exerted upon judges would be limited given the breadth of the words and the imprecision of the concepts used in any preamble, as well as the multiplicity of circumstances in which they might be applied. Nevertheless, this course is preferable to judges instead relying solely upon their own personal values or even upon their own perception of the values of the community. A justiciable statement of values in a new preamble might also enable courts to develop and deepen their understanding of community values by reference to the rich body of international law on such principles as democracy.<sup>73</sup>

The other key argument raised in favour of making any new preamble justiciable represents an objection to the possible adverse consequences of seeking to deny that justiciability. An express denial of a preamble's legal significance may dull the symbolic impact of its contents and render the sentiments expressed within 'hollow and hypocritical'.<sup>74</sup> Commentators have pointed out that fundamental values, of the kind typically recited in constitutional preambles, are significant precisely *because* they mark out the parameters of politico-legal legitimacy – the limits within which law-makers may act.<sup>75</sup> To assert those values, whilst simultaneously denying that they have any legal significance, appears at best a confusing contradiction and at worst an undermining of those values.<sup>76</sup>

On the other hand, the legal arguments made for denying a new preamble a role in legal interpretation seem rooted in a concern about the way in which courts – and especially the High Court – might apply a new preamble. It is true that the drafters of a preamble could not foresee all the contexts in which courts might rely upon the values and other principles expressed,<sup>77</sup> and the most strenuous objections to the High Court's reliance upon a new preamble have come from those determined to guard the Constitution against the implication of human rights principles. Some assert that the Constitution does not need reform in the area of rights protection, while others allude to the deliberate exclusion by the Constitution's framers of provisions that might have had the effect of

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73 Alex Reilly, 'Preparing a Preamble: the Timorous Approach of the Convention to the Inclusion of Civic Values' (1998) 21 *University of New South Wales Law Journal* 903, 907. See also Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205.

74 Reilly, above n 73, 904; Gregory Craven, 'Conservative Republicanism, the Convention and the Referendum' (1998) 21 *University of New South Wales Law Journal* 886, 889; Sir Harry Gibbs, 'A Preamble: The Issues' in The Samuel Griffith Society, *Upholding the Australian Constitution* (1999) vol 11, 85, 91.

75 Reilly, above n 73, 904.

76 Some participants at the 1998 Constitutional Convention, held in Canberra, believed that a clause denying judges recourse to a new preamble, if placed in the body of the Constitution rather than in the new preamble itself, would not dampen the 'rhetorical impact' of the values and principles recited in the latter. This suggestion came from Convention delegate George Winterton, and was apparently accepted by the Convention, as it featured in the Convention's recommendations. See Winterton, above n 66, 863.

77 See Winterton, above n 66, 863; Stephen Gageler and Mark Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review* 143, 147.

protecting individual rights.<sup>78</sup> For those sharing this outlook, the potential for a new constitutional preamble, reciting core values and principles, to establish a Bill of Rights 'by the back door' is reason enough to insist that it should be non-justiciable.<sup>79</sup> This reaction against justiciability was also a response to perceptions that, under Sir Anthony Mason and Sir Gerard Brennan, the High Court of the 1990s had become unduly 'activist'. Decisions such as *Mabo*, *Australian Capital Television* and *Wik Peoples v Queensland*<sup>80</sup> led to arguments that nothing should be done that might give members of the Court any increased capacity to imply new rights or, in the field of native title law, discover new or expanded legal entitlements to land.

Some of the proponents of a non-justiciable preamble have turned to other jurisdictions in search of examples to illustrate or vindicate their concerns. In *Re Resolution to Amend the Constitution*,<sup>81</sup> the Supreme Court of Canada held that the Preamble to the *Constitution Act 1867* (Imp) 'has no enacting force' and thus is not a source of law. However, in the subsequent case of *Re Provincial Court Judges*,<sup>82</sup> Lamer CJ, writing for the majority, held that

the preamble does have important legal effects ... the preamble articulates 'the political theory which the Act embodies' ... It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.<sup>83</sup>

Chief Justice Lamer held that judicial independence is guaranteed by the *Constitution of Canada* as it was recognised and affirmed by the Preamble to the *Constitution Act 1867* (Imp), which includes a reference to 'a Constitution similar in Principle to that of the United Kingdom'. The implied constitutional principle of 'judicial independence' was then invoked to strike down provincial legislation that was found to interfere with that independence. Critics of this decision have used it to suggest that access to an expansively worded preamble encourages judicial excess, in that it weakens the need to demonstrate that implied principles are referable to the text of the Constitution and indispensable to the proper functioning of the Constitution as a whole.<sup>84</sup>

In any event, Justices of the High Court, most notably Murphy J,<sup>85</sup> have proved capable of deriving a wide range of rights implications without recourse to the Preamble. For Murphy J and other judges willing to reason from the 'silent

78 Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 *Constitutional Forum* 60, 63.

79 Gibbs, above n 74, 94; Craven, above n 74, 888-9.

80 (1996) 187 CLR 1.

81 [1981] 1 SCR 753, 805, 883 (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ).

82 [1997] 3 SCR 3.

83 Ibid 69.

84 Goldsworthy, above n 78, 63. See also Winterton, above n 66, 863.

85 See George Williams, 'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy – Influential or Merely Prescient?* (1997) 50.



constitutional principles ... not mentioned in the Constitution'<sup>86</sup> or 'the democratic theme of the Constitution',<sup>87</sup> the presence or absence of a justiciable preamble is unlikely to make much difference. Justice Murphy even implied rights from his conception of 'the nature of our Constitution. It is a Constitution for a free society'.<sup>88</sup> Similarly, for a judge unwilling to reason from such sources, the presence of a justiciable preamble is equally unlikely to lead to the implication of new rights given the likelihood that the judge will feel constrained by the ordinary rules of statutory construction and the traditional principles of constitutional interpretation. Hence, it is difficult to see how a justiciable preamble would make any significant difference to the judicial propensity to derive implied rights.

The Constitutional Commission suggested in 1988 that if the High Court had access to an expansively worded new preamble, this would not change the way in which the Court undertakes the process of constitutional interpretation, as it would add nothing to existing interpretive principles. In particular, the Commission referred to the approach to constitutional interpretation adopted by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*,<sup>89</sup> under which the Court should 'always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose'. The Commission found that 'an expansively worded preamble [would not] seem to add anything where the Court approaches the Constitution in this way'.<sup>90</sup>

This, on the other hand, may underestimate the impact of a justiciable preamble. The Commission's conclusion does not account for situations in which the 'broad interpretation' of a provision will produce a construction that is inconsistent with fundamental rights. An example might be s 51(xxvi) of the Constitution, which gives the Commonwealth Parliament power to 'make special laws for the people of any race'. The High Court has yet to determine whether this provision allows the Parliament to make only laws of 'benefit' to a particular race or whether it also permits laws that produce a detriment.<sup>91</sup> The *Jumbunna* principle of 'broad interpretation' would favour the latter result. However, if the Court had access to a new preamble declaring equality to be a shared value – or perhaps recounting the dispossession of Indigenous peoples in Australia – it may find support for the alternative, narrower, interpretation. In this context, at least, recourse to a new preamble could add to the High Court's interpretive armoury.

After assessing the arguments, we conclude that a new preamble to the Constitution should be justiciable. The legal 'dangers' posed by a new preamble are small and often overstated. To date, minimal use has been made of the

86 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 108 (Murphy J).

87 *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 569 (Murphy J).

88 *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 388 (Murphy J). See also *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120, 157 (Murphy J).

89 (1908) 6 CLR 309, 367-8. This was affirmed in *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 314 (the Court).

90 Constitutional Commission, above n 56, vol 1, 109.

91 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('Hindmarsh Island Bridge Case').

current Preamble by Australian judges. It has been used sparingly to support conclusions grounded in other considerations, and has never been determinative of the outcome in a case. Even in *Leeth*, it is difficult to see that the Preamble actually made any difference to the result. Justices Deane and Toohey would have found an implied guarantee of equality under the law even if they had not had access to the Preamble.<sup>92</sup>

Even if a new preamble were drafted to include contemporary values and aspirations, and placed at the front of the Constitution itself, it could not give rise to substantive rights, having no textual foundation in the Constitution, the decision of the Canadian Supreme Court in the *Re Provincial Court Judges* notwithstanding. A Court could not apply a preamble in this way without compromising its institutional legitimacy (and if a judge is prepared to suffer such a consequence they will not need to refer to a preamble anyway). It seems highly unlikely that a justiciable preamble could itself bring about the implication of new rights.

The legal dangers of a justiciable preamble are not only greatly over-emphasised; the whole notion of a non-justiciable preamble is also misconceived. It would demean the values set out in the preamble. In addition, where a judge has reference to their understanding of the shared values of the Australian people in cases of ambiguity, it would be better for the judge to refer to such values in a preamble, formed through a process of democratic deliberation, rather than to their own perceptions of such values. It makes no sense to deny judges access to a set of values endorsed by the people and to force them instead to rely upon their own sense of such values (which may match those in the preamble in any event).<sup>93</sup> Once it is recognised that some use of values by judges is inevitable, they should not be denied access to a set of values endorsed by the community.

## VI CONCLUSION

Despite what some of the Constitution's framers may have anticipated, it is not surprising that the present Preamble has played a very limited role in the interpretation of the Constitution. It must not be forgotten that the Preamble does not accompany the Constitution itself, but rather sits at the head of the Imperial enactment to which the Constitution was appended for passage through the British Parliament. That the Preamble has received limited attention from judges can, we think, be attributed not only to this placement outside the 'four corners' of the Constitution, but also to the limited and relatively inconsequential matters with which it deals.

Suggestions for the addition of a new preamble to the Constitution, to be placed within that document at the head of its operative provisions, have

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92 The same conclusion is reached by Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10 *Public Law Review* 67, 68.

93 See *ibid.*

generally focused on the symbolic benefit that such an addition may bring. Whether and to what extent a new preamble should be 'justiciable' (ie, give rise to legal consequences, be they direct or indirect), has been a matter of contention. As we see it, the risks presented by a justiciable preamble are small, particularly when weighed against the advantages of providing a symbolic underpinning for the High Court's development of the concept of popular sovereignty. Moreover, a legally sterile preamble would not retain the symbolic potency intended for it.